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In The Supreme Court of the United States

October Term, 1972

No. .....

RICHARD B. JENNING, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on January 10, 1973.

CITATIONS TO OPINIONS BELOW:

The opinion of the District Court is unreported and is contained in the Transcript of the Proceedings, Pages 30-40. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, p. 9, is reported in ..... F. 2d .....

JURISDICTION:

The Judgment of the Circuit Court of Appeals was entered on January 10, 1973. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED:

Whether 26 U. S. C., Section 7203, which provides that any person who fails to file a return required by this Title is guilty of a misdemeanor, constitutes a crime against a fiduciary when a fiduciary is not included in the definition of the term person in 26 U. S. C., Section 7701 (a) (1).

STATUTE INVOLVED:

The statutory provisions involved are Section 7203 of the Internal Revenue Code of 1954, 26 U. S. C., Section 7203, and Section 7701 (a) (1) of the Internal Revenue Code of 1954, 26 U. S. C., Section 7701 (a) (1). They are printed in Appendix A, infra p. 8.

STATEMENT OF CASE:

An information was filed against RICHARD B. JENNING on April 8, 1971 (R. 1-4).[1] The jurisdiction of the District Court was invoked because the case arises under the Internal Revenue Act. The information contains six counts charging that Defendant has violated Section 7203 Internal Revenue Code; Title 26 United States Code, Section 7203. It charged that for the calendar years 1964, 1965, 1966, 1967 and 1968 Defendant, RICHARD B. JENNING, was the guardian of Mamie I. Jenning, late of Salem, Oregon, and that during the calendar year 1968 RICHARD B. JENNING, Defendant, was executor of the estate of Mamie I. Jenning. The information further states that Defendant, RICHARD B. JENNING, was required by law, on or before April 15th of each calendar year, to make an income tax return through the District Director of Internal Revenue for and on behalf of Mamie I. Jenning. It was further alleged in the information that the Defendant, RICHARD B. JENNING, failed to make the returns referred to at the time required by law and that Defendant's failure to make the returns was done willfully and knowingly (R. 1-4).

[1]Reference in this brief preceded by "R" are to Volume I of the record. If preceded by "Tr.", they refer to the transcript of testimony and to the pages as originally numbered therein.

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On September 29, 1971, Defendant filed a Motion to Dismiss the information upon the ground that the information did not state facts sufficient to constitute a crime under Section 7203 of the Internal Revenue Code, and on the ground that Defendant was denied a speedy trial in violation of his rights to due process of law (R. 9). On November 8, 1971, the Motion to Dismiss came on for hearing before the Honorable Alfred T. Goodwin, Judge of the United States District Court. At that time, RICHARD B. JENNING abandoned the issue of a denial of a speedy trial, and arguments were heard on the issue of whether or not the aforesaid statute constitutes a crime against Defendant, RICHARD B. JENNING (Tr. 2-13). The Honorable Alfred T. Goodwin took the matter under advisement and, on the 29th day of November, 1971, entered his Memorandum and Order denying the motion by Mr. Jenning (R. 19).

On June 6, 1972, the case came on for trial on the merits, before the Honorable Gus J. Solomon, Senior Judge, United States District Court for the District of Oregon. At that time, the parties executed a Stipulation wherein Mr. Jenning admitted to the material facts set forth in the information (R. 33; Tr. 17, 18). After brief testimony by Mr. Jenning and statements by counsel, Judge Solomon found Mr. Jenning guilty on all counts (R. 43; Tr. 43).

The sentencing was deferred until September 6, 1972, and on that date the Honorable Gus J. Solomon, Senior Judge, sentenced Mr. Jenning to be confined for a period of six months on Counts I, II, and III, and on Counts IV, V and VI suspended sentence and placed Defendant on probation for a period of three years (R. 43; Tr. 46). From this Judgment and sentence, Defendant appeals (R. 44). The relevant facts in this case were stipulated to by the parties and the case decided on a question of law. The criminal information and stipulation are included in the record (R. 1 - 4, 33 - 35).

The Court below affirmed the decision of the District Court, holding that the appellant, in his status as a guard-

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ian and then as an executor was a "person" as contemplated by the charging statute.

REASONS FOR GRANTING THE WRIT:

The Court below, in the instant case, has decided an important question of Federal law which has not been, but should be settled by this Court. The contention of the Petitioner is that while acting in the capacity of guardian of Mamie I. Jenning, and as executor of the estate of Mamie I. Jenning, he was not a "person", as that term is used in the charging statute, 26 U. S. C., Section 7203. He occupies the status of a "fiduciary", as defined by 26 U. S. C., Section 7701 (a) (6), and as such is not within the purview of the criminal sanctions of Section 7203.

Clearly, the question presented is of importance in the administration of the Internal Revenue Laws. This is evident from the fact that, although diligent search has been made by both parties in this case, as well as the Justice Department and the Internal Revenue Service, there has been revealed no cases where a Federal Court has dealt with the issue presented here, nor, for that matter, have there been any cases found where a guardian or executor or other fiduciary has been prosecuted under this statute (Tr. 12). *United States v. General Expressways, Incorporated*, 270 F. Supp. 115 (D. C. Col. 1967), decided an issue analogous to the question presented here. In that case, the Defendant was charged under 49 U. S. C., Section 323 and I. C. C. Regs. 49, C. F. R., Section 188, with having extended credit to shippers for a period exceeding seven days of the date of delivery. The Defendant's Motion to Dismiss on the ground that Section 323 did not constitute a crime against the carrier was granted. The Court stated:

> "(2, 3) Where the Court is confronted with a statute which has been on the books for thirty-one years, and which contains in its annotations no criminal cases, and where the government has not demonstrated to the Court that there have in fact ever been any criminal prosecutions under the statute, the Court

should be most reluctant to attribute to the statute penal sanctions. * * *" 270 F. Supp. 115, 116.

Although the facts of the *General Expressways* case (supra) are not directly on point with those of the instant case, the general principals of strict construction of criminal statutes highlight the importance for the allowance of this petition. First, 26 U. S. C., Sections 7203 and 7701 have been in force in their present form since the revision of Title 26 in 1954, and in almost identical form under the prior Internal Revenue Code enacted in 1939. 26 U. S. C. A. (I. R. C. 1939) Section 145. At no place has research disclosed a reported case wherein a fiduciary has been criminally prosecuted for failure to file a tax return for a guardian or estate. The fact that there have been no previous prosecutions based on a statute purported to impose criminal liability on a fiduciary during the great length of time the statute has been in force stresses the importance of the decision by this Court construing the statute in question.

Settlement of the question by this Court is plainly in the public interest, since, if the interpretation of the Ninth Circuit Court of Appeals is followed, the door would be opened for expanding criminal prosecutions under the Internal Revenue Act to those acting in a fiduciary capacity, which would have the obvious effect of discouraging the undertaking of such responsibility. The omission of fiduciaries from the definition of person, while including executors and guardians within the definition of a fiduciary, can mean only that omission was purposeful and that the intent of Congress was to exclude fiduciaries from the classification of person for the purpose of the Internal Revenue Code. The intricate nature inherent in the Revenue Act requires strictness and completeness in the use and definition of terms. That Congress was cognizant of this need is apparent from its effort in Section 7701 (a), which contains 34 subsections to spell out the meaning of terms as used in that title. In addition, throughout the code where a special meaning of some term is meant to be applied in that chapter or subchapter, Congress has religiously devoted a section to make clear its intent. This is

further brought to light from examination of 26 U. S. C. Section 6012, under Paragraphs 2 and 4 of (b), which set forth who should make returns for estates, trusts and persons under a disability, and in both places a fiduciary is expressly included. In short, if Congress had intended fiduciaries to be subject to the same laws and criminal sanctions under the criminal chapter of Title 26, as are applied to persons, it would have expressly included them, either in the charging section itself or, at the very least, in Section 7343 along with partners and corporate officers.

Further, the intent to exclude fiduciaries from the classification of "person", and consequently from the criminal liability set forth in Section 7203, is consistent with public policy. It is to the benefit of society to encourage citizens to assume the duties and responsibilities of guardians, executors, and other fiduciary relationships, in order that the affairs of the ward may be properly handled and estates administered and distributed. The obvious effect of exposing guardians and executors to the possibility of criminal liability for failure to comply with the intricacies of the Internal Revenue Code would be to discourage the undertaking of such responsibilities.

In addition, there was no need for Congress to subject a fiduciary to criminal liability. This stems from the fact that until all Federal taxes which are owed to the government by an estate or guardianship are paid, the estate or guardianship cannot be closed. There are also available to the government various civil penalties which can be assessed to the estate or guardianship to further protect its interest. The remedy of the estate or guardianship when confronted with the situation of an incompetent fiduciary is to file a Motion to have him removed and replaced by someone else. With both the interests of the government and the estate or guardianship protected, there remains no compelling reason for Congress to impose criminal liability on a fiduciary.

CONCLUSION:

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
CHARLES D. BURT
Counsel for Petitioner

APPENDIX A

26 U. S. C. (I. R. C. 1954)
Section 7203, states:

"WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

26 U. S. C. (I. R. C. 1954)
Section 7701, states:

"DEFINITIONS.

"(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof —

"(1) PERSON. — The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

(6) FIDUCIARY. — The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
vs.
RICHARD B. JENNING,
Defendant-Appellant.

No. 72-2809

[January 10, 1973]

Appeal from the United States District Court for the District of Oregon

Before: KOELSCH and WRIGHT, Circuit Judges, and NEILL, District Judge.*

PER CURIAM:

Appellant was convicted on six counts of willfully failing to file income tax returns under 26 U.S.C. §7203. Prior to trial, it was stipulated that appellant was required by law to file the returns in his capacity as guardian and later as executor of the estate of Mamie Jenning.

The sole issue on this appeal is whether appellant in his status as a guardian and then as an executor was a "person" as contemplated by the charging statute. We hold that he was and, accordingly, the decision of the district court is affirmed.

*Sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1100

RICHARD B. JENNING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a bench trial in the United States District Court for the District of Oregon, petitioner was convicted on five counts of failing to file income tax returns on behalf of Mamie I. Jenning, as her guardian, and on one count of failing to file a fiduciary income tax return as executor of Mrs. Jenning's estate, all in violation of Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. 7203. Petitioner was sentenced to six months' imprisonment and placed on probation for three years. The court of appeals affirmed *per curiam* (Pet. App. B). Petitioner's only defense at trial, and his only contention here and in the court below, is that an individual acting as a fiduciary is not a "person" as that term is used in Section 7203.

There is no merit to petitioner's contention. Section 7203 in pertinent part provides:

> Any person * * * required by this title or by regulations made under authority thereof to make a return * * * who willfully fails to * * * make such return * * * shall * * * be guilty of a misdemeanor * * *.

The persons required to make income tax returns are specified by Section 6012 of the Code. Section 6012(b)(2) requires the return of an incompetent individual to be made "by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual," and Section 6012(b)(4) requires the income tax returns of an estate to "be made by the fiduciary thereof." Section 7701(a) defines "person" as including, *inter alia,* both an "individual" and an "estate," and defines "fiduciary" as including "any person acting in any fiduciary capacity for any person." Thus it is clear that petitioner, in his capacities as guardian and executor, was the "person" required to make the income tax returns for Mrs. Jenning and her estate.

Petitioner's argument to the contrary is apparently based on the fact that Section 7701(a)(1), in defining "person", does not explicitly include a "fiduciary." However, any such inclusion would have been circular, for, as is shown above, "fiduciary" is itself defined in part by reference to "person" and includes any "person" acting in any kind of fiduciary capacity. But the language of the statute which petitioner is charged with violating encompasses any "person" who is required to make a return. "Person" is simply the basic term used in the Code for referring to any entity of whatever kind, natural or artificial; it means and includes "an individual, a trust, estate, partnership, association, company or corpor-

ation" and thereby embraces, *inter alia*, all individuals acting as fiduciaries, including petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.